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No. 80-1765

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE AMERICAN SOCIETY OF MECHANICAL ENGINEERS, INC.,
Petitioner,

v.

HYDROLEVEL CORPORATION,
Respondent.

BRIEF AMICUS CURIAE OF AMERICAN CHEMICAL SOCIETY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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PRELIMINARY STATEMENT

The American Chemical Society (hereinafter "ACS" or "the Society") submits this brief amicus curiae in support of the petition for certiorari filed by the American Society of Mechanical Engineers, Inc. (hereinafter "ASME"). All parties to this suit have given ACS written consent to the filing of this brief. Copies of such consents have been filed with the Clerk of this Court.

INTEREST OF THE AMICUS

The American Chemical Society is a non-profit, scientific, and educational organization with a membership of approximately 120,000 chemists and chemical engineers, reflecting a broad spectrum of academic, governmental, and industrial

professional pursuits. The Society is the largest single organization for chemists and chemical engineers in the United States and the world's largest organization devoted to a single science.

Similarly to ASME, the Society is not a trade association; rather, it is a membership organization exempted from federal taxation under Section 501(c)(3) of the Internal Revenue Code. Originally incorporated in the state of New York, ACS received a federal charter by Act of Congress in 1937. The objects of the Society, as set forth in Section 2 of its charter, are

> ... to encourage in the broadest and most liberal manner the advancement of chemistry in all its branches; the promotion of research in chemical science and industry; the improvement of the qualifications and usefulness of chemists through high standards of professional ethics, education, and attainments; the increase and diffusion of chemical knowledge; and by its meetings, professional contacts, reports, papers, discussions, and publications, to promote scientific interests and inquiry, thereby fostering public welfare and education, aiding the development of our country's industries, and adding to the material prosperity and happiness of our people.

In furtherance of these goals, the Society has become a leading publisher of scientific journals in chemical fields and holds regular scientific meetings to promote the dissemination and exchange of chemical and scientific information. Additionally, however, and of greater importance to the instant case, ACS maintains numerous divisions and committees of the Society which are dedicated to the promotion and improvement of specific fields of chemistry and chemical engineering. Drawing on the expertise of volunteers from all sectors (academia, private industry, and government), the Society, its divisions, and committees frequently formulate guidelines or, in some instances, standards for the betterment of the chemical profession and chemical education which redound to the benefit of the public.

As is the case with the codes and standards developed and interpreted by ASME, the guidelines and standards formulated

by ACS are "voluntary," but they sometimes are incorporated into or utilized in federal, state, and local laws, regulations, and ordinances. Among ACS activities which result in the formulation of standards or guidelines are the following:

ACS Specifications for Analytical Reagents—

The ACS Committee on Analytical Reagents establishes and publishes a book of standards of quality for reagents to be used in analytical work, designating maximum amounts of given impurities which may be contained in specific reagents. Manufacturers of chemicals greatly value the right to label their reagents as ACS approved.

Setting Chemical Nomenclature—

The ACS Committee on Nomenclature establishes and publishes standardized nomenclature for the identification of chemical materials, properties and reactions. The ACS nomenclature is generally accepted and utilized by academia, private industry and the government. Several government regulatory agencies utilize the ACS nomenclature in identifying particular chemical substances.

Accreditation of Chemistry Departments—

ACS evaluates chemistry departments at colleges and universities and formally approves those which satisfy its guidelines.

Health and Safety—

ACS publishes a chemical laboratory safety manual, guidelines for the authors of laboratory text books, guidelines for chemistry faculty teaching handicapped students, and health and safety guidelines for chemistry teachers.

Employer/Employee Relations—

ACS has promulgated and published "Professional Employment Guidelines" delineating duties and responsibilities of employer to employee and vice versa in private industry.

Additionally, ACS works closely with the federal government (both by contract and voluntarily) in formulating, interpreting, and evaluating governmental regulations impacting on chemists, the chemical industry, and the public. For example, in commenting on proposed OSHA regulations concerning hazardous chemicals as they affect research and development laboratories, ACS surveyed over 1500 entities and provided the survey results to OSHA.

All the above programs and activities primarily are carried out by members of ACS who have volunteered their time to serve on the committees vested with the responsibility to formulate and interpret standards and guidelines. Because of the large number of divisions, committees, and sub-committees maintained by ACS, it is not possible for ACS to monitor all the activities of these groups. ACS must rely on the good faith, dedication, and professionalism of the members who volunteer to serve on such bodies. While the structure and procedures of the ACS committee system make it unlikely that any individual or group of individuals could intentionally misuse their positions in order to damage another individual or entity, the ASME experience proves that it is not impossible.

It is the position of the American Chemical Society that to hold an organization liable for violation of the antitrust laws where its agent acted without the organization's knowledge and without any intention to benefit the organization is contrary to the case law established by this Court and is contrary to public policy.

QUESTIONS PRESENTED AND STATEMENT OF THE CASE

ACS adopts the questions presented and statement of the case as set forth in ASME's petition for certiorari.

ARGUMENT

At the outset it should be emphasized that the ACS strongly supports and adopts the position of ASME. ACS believes that ASME's petition for certiorari persuasively and accurately describes the background of this case, delineates the errors and legal misinterpretations committed both by the trial court and the appellate court, and forcefully presents the arguments and cases demonstrating that the Second Circuit's application of the apparent authority doctrine to the facts of this case to establish liability for antitrust violations is insupportable under the decisions of this Court and the other Circuits. The ACS wishes to elucidate further for this Court the deleterious effects on non-profit voluntary organizations and the detriment to the public which would result if the Second Circuit panel's decision is permitted to stand.

Since medieval times, with the advent of the merchant guilds and craft guilds, voluntary associations have played an important role in organized societies, and this especially has been true in the United States. As early as 1835, Alexis de Tocqueville was led to comment on the propensity of Americans to organize in voluntary associations:

> Americans of all ages, all conditions, and all dispositions constantly form associations. They have not only commercial and manufacturing companies, in which all take part, but associations of a thousand other kinds, religious, moral, serious, futile, general or restricted, enormous or diminutive. The Americans make associations to give entertainments, to found seminaries, to build inns, to construct churches, to diffuse books, to send missionaries to the antipodes; in this manner they found hospitals, prisons, and schools. If it is proposed to inculcate some truth or to foster some feeling by the encouragement of a great example, they form a society. Wherever at the head of some new undertaking you see the government in France, or a man of rank in England, in the United States you will be sure to find an association.

A. de Tocqueville, *Democracy in America* (1835). Such associations are formed for a multitude of purposes and, whether they are professional societies, trade associations or 501(c)(3) organizations, they perform vital functions which contribute to the public interest and welfare. The voluntary efforts of such organizations result in an enhanced interchange of information among specialists in the professions and in industry, education of the public and consumers as to safety and reliability of products, supervision and maintenance of high ethical and professional standards, and improvement of the quality of goods and services utilized by industry and the public. None of these results could be achieved were the individual members of these organizations not willing to dedicate their time and expertise voluntarily to working with their peers in attempting to improve the products (be they goods or services) of their particular pursuits.

Among the many activities performed by professional and technical organizations, standardization and certification programs have long been recognized not only for their benefit to association members but also to the public. "[Associations and their members] have engaged in many activities to which no exception is taken by the government, and which are admittedly beneficial to the industry and to consumers; such as ... the standardization and improvement of its product." *Maple Flooring Mfrs. Ass'n.* v. *United States,* 268 U.S. 563, 566 (1925). Standards programs which, rather than seeking to establish uniformity among products, emphasize maintenance of the quality and grade of products also have been consistently supported by the judiciary and by the Federal Trade Commission. See, *United States* v. *College of American Pathologists,* 1969 Trade Cas. Par. 72,825 (N.D. Ill. 1969); Advisory Opinion to the American National Standards Institute, Inc., CCH Trade Reg. Rep. Par. 1718.20 (FTC 1971).

Were it not for the voluntary efforts of trade, technical and professional associations in creating standardization and certification programs, many such programs would not exist, for neither private industry nor the government has the human resources or the money to assume the burden of establishing

and maintaining such programs. For example, in 1964 there were 13,600 nationally-used standards in effect, of which more than 3,000 required annual revision. Wachtel, *Products Standards and Certification Programs,* 13 ANTITRUST BULL. 1 (1968); Lange, *Steps to American Standards,* AMERICAN MANAGEMENT 6 (Aug. 1965). As of 1976 approximately 25,000 standards had been developed by voluntary organizations during the preceding ten years; it was estimated that tens of thousands of individuals, working with some 180 standards-producing organizations, had contributed to the support of such programs at an *annual* cost of over $250,000,000. Hagan, *In Defense of Voluntary Trade Product Standards,* MBA, April 1978. Thus "for government to undertake the responsibility for all this work would not only significantly increase the direct cost of government but would divert from their main occupations a significant portion of the nation's talented technicians." Wachtel, *supra* at 7.

Yet, if the decision below is permitted to stand, large numbers of voluntary organizations may find it necessary to abandon their standardization and certification programs rather than face the threat of potentially debilitating antitrust judgments such as that in the instant case. As previously stated, professional and technical organizations (especially 501(c)(3) organizations such as ACS and ASME) must rely on the expertise and services of volunteer members to carry out the organizations' activities. Necessarily, such volunteers may be associated with businesses whose economic interests may be affected by the organizations' activities. Under the Second Circuit's theory of vicarious liability in the context of federal antitrust laws, non-profit associations are made the guarantors of all acts of volunteer members, even where the acts of such members are contrary to the organization's goals, are done without the knowledge of the organization, and in fact are done solely with the intent of benefitting another entity.

The Second Circuit opined that ASME should be held liable because it had failed to create appropriate "internal review procedures" which would have prevented issuance of the erroneous interpretation letter. As ASME has pointed out, the letter was reviewed by the appropriate individuals within its

organization and, even had there been other review procedures, the ulterior purpose of the letter would not have been detected. No workable review procedure can be formulated which would prevent an unscrupulous member from utilizing his voluntary position in the organization to his own benefit. Virtually all association members who volunteer to serve on the committees and groups formed to carry out the association's activities do so out of dedication to the aims of the organization and out of a desire to contribute to the improvement of the products and services provided in their specialized fields. There may be a few such individuals who serve in order to advance their own interests, but to make non-profit associations strictly liable for all actions of such individuals (where the association has no knowledge of such actions) does not serve the public interest and does not comport with established law.

CONCLUSION

Since the first federal income tax in 1913, there have been exemptive provisions in the taxing statutes which specifically grant tax-exempt status to trade, technical, and professional associations. The exemptions granted were "made in recognition of the benefit which the public derives from corporate activities of the class named [in the exempting statutes]." *Trinidad* v. *Sagrada Orden de Predicadores*, 263 U.S. 578, 581 (1924). As emphasized above, standardization and certification activities of such voluntary associations not only benefit the public by improving the quality, uniformity, and safety of innumerable goods and services, but also constitute the performance of vital economic functions which neither private industry nor the government is properly equipped to perform. The Second Circuit's decision, by imposing potential treble damage liability on such associations for "unintentional participation" in the antitrust violations of others, threatens the continued maintenance of voluntary standards and certification programs to the detriment of the American public.

For the foregoing reasons, along with those set forth in the petition for certiorari, the American Chemical Society respectfully urges that ASME's petition for certiorari be granted.

Respectfully submitted,

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